

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0702, State of NH v. James McGinn, the court on August 26, 2005, issued the following order:

The defendant, James McGinn, appeals an order of the trial court denying his motion for new trial based upon ineffective assistance of counsel and denying his motion to amend sentence. We affirm and remand.

To prevail on his claim of ineffective assistance of counsel, the defendant must show that counsel's representation was constitutionally deficient and that the deficient performance actually prejudiced the outcome of the case. See State v. Roy, 148 N.H. 662, 664 (2002) (standard for determining whether counsel's performance constitutionally deficient same under State and Federal Constitutions). The defendant must overcome the strong presumption that counsel's conduct fell within the limits of reasonable practice, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make. State v. Croft, 145 N.H. 90, 91 (2000). In addition, the defendant must establish with reasonable probability that the result of the proceeding would have been different had competent legal representation been provided. Under the Federal Constitution, the issue is whether counsel's performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* at 91-92.

With respect to several of the alleged errors, the defendant has failed to overcome the presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance. For example, the defendant has failed to demonstrate that it was unreasonable for counsel to use Officer Greeley's response on cross-examination to his advantage as explaining that the defendant's decision not to talk to the police was motivated by his lawyer's advice, or to permit the admission of the victim's diary in its entirety since it furthered his strategic decision to argue that the diary in its entirety was fantasy, or to not introduce certain medical records based upon counsel's reasonable conclusion that their admission would have been helpful to the State. We agree with the State that the defendant failed to demonstrate that the remaining alleged errors actually prejudiced the outcome of the case.

We disagree with the defendant's contention that the trial court used an improper legal standard. The trial court correctly stated that to establish actual prejudice, the defendant must demonstrate that there is a reasonable probability that the result of the proceeding would have been different had he received competent legal representation, and that a reasonable probability is a

probability sufficient to undermine confidence in the outcome of the case. We understand the trial court's later reference to the defendant's failure to prove that the outcome of the trial would have differed as denoting the defendant's failure to meet the actual prejudice standard earlier articulated by the trial court.

Finally, we agree with the State that the defendant has not demonstrated that the sentences imposed in this case violated double jeopardy. See State v. Krueger, 146 N.H. 541, 542-43 (2001). We note, however, that read broadly, the defendant's pleadings below and on appeal can be read as arguing that the imposition of consecutive sentences under the circumstances of this case constituted an unsustainable exercise of discretion, and that the failure to make this argument at sentencing or on direct appeal constituted ineffective assistance of counsel. See, e.g., Defendant's Motion to Amend Sentences at 5, 9 (arguing for sentencing approach set forth in ABA Standards for Criminal Justice and United States Sentencing Guidelines); Defendant's brief at 28-30. The defendant relied upon language in Krueger, in which we rejected an argument that the prosecution of ninety separate sexual assault counts stemming from the defendant's actions over the course of twenty-five minutes involving a single victim constituted an "unjust" application of the criminal statute. In distinguishing a Wisconsin case, we noted that the jury in Krueger had videotape evidence that allowed it to view each of the defendant's actions and find for themselves if there was time for reflection between the charged acts. Krueger, 146 N.H. at 543. Although we expressed concern that the defendant was subject to so many indictments for such brief conduct, we further noted that the trial court exercised "sound judgment" in consolidating the indictments for purposes of sentencing. Id. at 543-44. Without expressing an opinion as to the merits of the arguments, we conclude that the defendant sufficiently raised the issues of whether the consecutive sentences in this case constituted an unsustainable exercise of discretion and whether the failure to raise this issue at sentencing or on direct appeal constituted ineffective assistance of counsel.

Given that the defendant's arguments centered principally upon his claim that the consecutive sentences violated double jeopardy, it is understandable that the trial court's order appears to have addressed only that claim. We affirm the trial court's order, but remand for such further proceedings as the trial court deems necessary to allow it to consider the defendant's arguments that the consecutive sentences in this case constituted an unsustainable exercise of discretion under Krueger and that the failure to raise that issue at sentencing or on direct appeal constituted ineffective assistance of counsel.

Affirmed and remanded.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**